Supreme Court, U.S.
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No. 89-525

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AHMADE RATEB POPAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOEL B. RUDIN
Mass & Rudin
Attorneys for Petitioner
Ahmade Rateb Popal
415 Madison Avenue
Seventh Floor
New York, New York 10017
(212) 969-9200

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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Petitioner, Ahmade Rateb Popal, respectfully submits this supplemental brief to his petition for certiorari to bring new materials to the attention of this Court relevant to the Court's determination of the merits and the timeliness of the petition.

TIMELINESS AND JURISDICTION

For the reasons explained in the initial petition at 2-3, the petition was filed more than 60 days from the denial of petitioner's appeal by the court of appeals. While ordinarily the 60-day period in which to file a petition for certiorari would be tolled by the filing of a timely petition

for rehearing in the court of appeals, Popal's petition for rehearing was "untimely," having been filed more than 14 days after the decision of the court of appeals denying his appeal.

However, after the docketing of this petition for certiorari on September 26, 1989, the court of appeals granted Popal's motion to file his petition for rehearing "out of time." *See* Order of the Hon. George C. Pratt, Circuit Judge, dated September 29, 1989. The petition for rehearing with suggestion for rehearing en banc is still *sub judice*. Since the court of appeals intends to decide the petition for rehearing on the merits as if it had been timely filed, we respectfully urge this Court to deem it to have been "timely" filed for the purposes of Supreme Court Rule 20.4.

In any event, we continue to request the Court to defer consideration of this petition for certiorari pending determination by the court of appeals of the petition for rehearing with suggestion for rehearing en banc. *See* Petitioner's Motion for Deferral of Consideration dated September 25, 1989.

ADDITIONAL FACTS RELEVANT TO THE STATEMENT OF THE CASE

When the petition for certiorari was filed, no pretrial transcripts were available to establish petitioner's assertion that he had not knowingly and voluntarily waived his right to the presence of a district judge during jury selection. *See* Pet. at 5 n.1. The relevant transcripts are now available and establish that petitioner never personally consented, verbally or in writing, to the substitution of a magistrate for the district court at jury selection, nor was his right to have an Art. III district judge preside ever explained to him.

The subject of jury selection by a magistrate was raised only once in petitioner's case: on September 7, 1988, during the first appearance in the case before District Judge Dearie. The transcript of this proceeding is reproduced in the supplemental appendix hereto at 1a-3a. Petitioner Popal, who had been detained without bail, was not produced by the United States Marshall for this session (2a). At the end of the status conference, the following colloquy occurred:

> THE COURT: Do either *defense counsel* have a problem with the magistrate selecting the jury?
>
> [CO-DEFENDANT'S COUNSEL]: No, your Honor.
>
> [PETITIONER'S COUNSEL]: No, *I* have no problem with that. (3a) (emphasis added).

The court then stated that whether it or a magistrate selected the jury would depend upon the court's schedule (3a).

During subsequent status conferences, the matter never arose. On October 5, 1988, notice of jury selection by a magistrate was issued to the parties. Pet. at 5 n.1. The transcript of jury selection on October 24, 1988, indicates that the jury was summoned and the selection process begun without any preliminary discussion or waiver procedure (5a).

In sum, while petitioner's *counsel* stated—in petitioner's absence—that *counsel* had "no problem" with delegation of jury selection to a magistrate, *petitioner* never *personally* consented to waive his basic right to have a duly-empowered district judge preside.

ADDITIONAL REASONS FOR GRANTING THE WRIT

Petitioner continues to maintain that, based upon this Court's decision in *Gomez* v. *United States*, 109 S.Ct. 2237

(1989), the judgment below should be summarily reversed and the matter remanded for a new trial. However, since our petition was filed, the Government itself has stressed the need for a uniform national rule to resolve the conflict in the circuits concerning the issues raised in this petition. Thus, should this Court believe that summary reversal is not warranted, it should grant certiorari so that it can determine an appropriate national rule.

The Government's statement is contained in its Petition for Rehearing With Suggestion for Rehearing En Banc [hereinafter referred to as "*France* Petition"] in *United States* v. *France*, ___ F.2d ___, 1989 Westlaw 104012 (9th Cir., September 13, 1989). The *France* Petition, served October 27, 1989, notes the conflict between the second and ninth circuits and asserts that "the panel's decision raises questions of exceptional importance." *France* Petition at 5. According to the petition, because the regular practice in the District of Hawaii prior to the decision in *Gomez* was for the magistrate to select juries in "nearly every felony trial held in that district for several years," "dozens of convictions" will have to be reversed. *Id.* Indeed, the Petition represents that 48 appeals are presently pending in the Ninth Circuit in which this issue has been or could be raised. *Id.* It then concludes: "Because . . . of the practical consequences of the panel's decision, we submit that the decision 'substantially affects a rule of national application in which there is an overriding need for national uniformity.'" *Id.* at 8.

The Government clearly is correct that there is a present need for a uniform national rule. In the Ninth Circuit, numerous convictions are being reversed, but this is occurring close in time to the defendants' arrests and trials, thereby permitting the Government a fair opportunity to retry the defendants, while sparing those

defendants who are acquitted upon retrial unnecessarily prolonged incarceration. However, in the second circuit, defendants who failed to object to magistrate-conducted jury selection are being denied retrials. *See United States* v. *Vanwort*, 887 F.2d 375 (2d Cir. 1989), petition for rehearing pending; *United States* v. *Wong*, 884 F.2d 1537, 1544-46 (2d Cir. 1989), petition for certiorari pending, Dkt. No. 89-5949. If this Court ultimately rejects the second circuit's position, but does so in a later, as opposed to this, case, the Government may not be in a position to retry many of the affected defendants, while any defendants who ultimately are acquitted upon retrial will have been subjected to unnecessary, unjust imprisonment. Because the issues raised in this case bear so directly upon the administration of justice in the federal courts and the rights of scores of defendants, the petition should be granted.

CONCLUSION

For the additional reasons set forth above, the relief requested in the petition for certiorari should be granted.

Respectfully submitted,

JOEL B. RUDIN
Mass & Rudin
Attorneys for Petitioner
Ahmade Rateb Popal
415 Madison Avenue, Seventh Floor
New York, New York 10017
(212) 969-9200

Dated: New York, New York
November, 1989

APPENDIX

APPENDIX

United States District Court

FOR THE
EASTERN DISTRICT OF NEW YORK

CR 88 455

UNITED STATES OF AMERICA,
v.
SHAMSUL HAQ AND AHMAD RATAB POPAL, *Defendant.*

United States Courhouse
Brooklyn, New York
September 7, 1988
10:00 o'clock a.m.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE RAYMOND J. DEARIE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: ANDREW J. MALONEY
United States Attorney
BY: PETER GINSBERG, ESQ.
Assistant United States Attorney
225 Cadman Plaza East
Brooklyn, New York

For the Defendant: GERALD WEISS, ESQ.
For defendant Haq
FRANK LOPEZ, ESQ.
For defendant Popal

Court Reporter: Henry R. Shapiro
225 Cadman Plaza East
Brooklyn, New York
718-330-7687

[2] THE CLERK: Criminal cause for status conference, USA versus Shamsul Haq and Ahmad Ratab Popal.

MR. GINSBERG: Peter Ginsberg.

MR. LOPEZ: Gerald Weiss for Haq.

MR. WEISS: Frank Lopez for Popal.

THE COURT: These gentlemen had previously been arraigned?

MR. LOPEZ: Yes, they have.

THE COURT: I only see one defendant.

MR. LOPEZ: That is my client Mr. Popal through some misunderstanding, I don't think was produced today, but I have a request for these proceedings. I'm willing to waive his presence with this request.

May I proceed.

THE COURT: Please.

* * *

[5] THE COURT: I have to be perfectly forthright with all of you. The calendar being what it is, it's going to be very hard to get this in. I would ordinarily say I would like to have another judge try it, but my colleagues are really embattled with these long trials.

MR. LOPEZ: I have a case which I am starting September 26. It's the second Wedtech case. That case should go about four weeks, and that case is in the Southern District of New York.

THE COURT: I don't think they had any criminal trials in the Southern District as short as four weeks.

MR. LOPEZ: I think they have them here now, your Honor.

THE COURT: I think realistically the first date that I perceive is October 24. That is outside the speedy trial window and if there are no motions, we will have to confront that and I'll put

responsibility on you Mr. Ginsberg, in the event the defense feels it's not necessary to file any motions, we have to contend with the speedy trial situation which means either a limited waiver or some basis upon which to make a sensible exclusion. What date did you say?

MR. LOPEZ: The 24th.

THE COURT: Do either defense counsel have a problem with the magistrate selecting the jury?

MR. WEISS: No, your Honor.

[6] MR. LOPEZ: No, I have no problem with that.

THE COURT: You will get notification. We have jury selection on the 17th—

MR. WEISS: I have a problem with that date. I'm getting married on the 15th and I won't be—

THE COURT: What are your plans for that week—

MR. WEISS: Two or three days, perhaps the week.

THE COURT: Let's schedule selection for the morning of the 24th.

MR. WEISS: Thank you, your Honor.

THE COURT: That will be at 9:30. I don't know who will do it yet. If I'm finished with the trial that is immediately preceding you, I'll do it, otherwise I'll ask a magistrate. We ought to get some sense when we ought to expect motions from defense. You already stated you already started your discovery. Today is the 7th. Would the 19th be reasonable.

* * *

United States District Court

FOR THE
EASTERN DISTRICT OF NEW YORK

CR 88 455 (RJD)

UNITED STATES OF AMERICA,
v.
AHMAD POPAL, *Defendant.*

United States Courhouse
Brooklyn, New York
October 24, 1988

TRANSCRIPT OF JURY SELECTION
BEFORE THE HONORABLE JOHN L. CADEN
UNITED STATES MAGISTRATE

APPEARANCES:

For the Government:	ANDREW J. MALONEY, ESQ. United States Attorney BY: CHERYL POLLACK, ESQ. PETER GINSBERG, ESQ. Assistant U.S. Attorneys
For the Defendants:	FRANK LOPEZ, ESQ. Attorney for defendant
Court Reporter:	Henri LeGendre 225 Cadman Plaza East Brooklyn, New York (718) 330-7687

[2] (Prospective jurors enter courtroom.).

THE COURT: Would everyone please stand so Helen can administer the oath to you.

(Whereupon prospective jurors were sworn in by the Clerk of the Court.)

THE COURT: Helen will call out last names—can the men and women hear me okay?

Can everybody hear me okay?

Helen is about to call out 12 names; the first six names will have a seat at my immediate left, one through six, one being closest to me; then we'll fill in the second row similarly with jurors seven through twelve and we'll leave those end seats vacant. If Helen mispronounces anyone's name would you be kind enough to correct us, please.

THE CLERK: Juror No. One, Cornelius Brown.

Juror No. Two, Cynthia Schultz.

Juror No. Three, Dominico Cintron.

Juror No. Four, Bruce Burnett.

Juror No. Five, Albert Ferrer.

Juror No. Six, Dominick Diorio.

Juror No. Seven, Bernard Applewhite.

Juror No. Eight, Edward Hendrickson.

Juror No. Nine, Stanley Lowe.

Juror No. Ten, Arcay Star.

Juror No. Eleven, Marshall Edell.

[3] Juror No. Twelve, Irving Ackerman.

THE COURT: Good Afternoon. We are about to begin the selection of a jury in a criminal case.

[Preliminary legal instructions and *voir dire* conducted].

* * *